

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE DEPARTMENT OF NATURAL RESOURCES

In the Matter of the Appeal of the  
Invasive Species/Infested Waters  
Citation Issued to Vaughn Otto Lemke,  
Citation No. 172002

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND RECOMMENDATION**

This matter came before Administrative Law Judge Ann O'Reilly for a prehearing telephone conference call on July 11, 2013, pursuant to a Notice of Prehearing Conference and Notice of Hearing that was issued on July 2, 2013. Conservation Officer Adam Block appeared on behalf of the Minnesota Department of Natural Resources (DNR). Appellant Vaughn Lemke (Appellant or Lemke) appeared on his own behalf without counsel.

During the telephone conference on July 11, 2013, the parties agreed to conduct a formal hearing on the citation. Sworn testimony was taken at the hearing. The parties agreed that the Administrative Law Judge could make a recommendation based on the record created during the hearing. The record closed on July 11, 2013, at the close of the hearing.

**STATEMENT OF THE ISSUE**

The issue presented in this matter is whether Appellant was properly issued a civil citation under Minn. Stat. §§ 84D.10, subd. 4(b) and 84D.13, subd. 5(a)(6) for failing to have drain plugs removed or open when transporting water-related equipment.

**SUMMARY OF RECOMMENDATION**

The Administrative Law Judge concludes that the DNR has established by a preponderance of the evidence that Appellant committed a violation of Minn. Stat. § 84D.10, subd. 4(b), and, therefore, recommends that the Commissioner affirm the citation and fine.

Based on the proceedings herein, the Administrative Law Judge makes the following:

## FINDINGS OF FACT

1. On May 25, 2013, Conservation Officer Adam Block was parked at the Sand Point/Crest Avenue public access to Prior Lake in Scott County, Minnesota.<sup>1</sup> Officer Block was at the landing to observe the boats being launched or removed at the access.<sup>2</sup>

2. Officer Block was particularly interested in ensuring that boats being launched into or removed from the lake follow all conservation requirements to ensure that aquatic invasive species<sup>3</sup> not be transported by water-related equipment into or out of the lake.<sup>4</sup> Certain aquatic invasive species, such as Zebra Mussels and Eurasian Water Milfoil, are transportable in the bilge water of watercraft.<sup>5</sup> Thus, to ensure invasive species are not transported from one body of water to another, Minnesota state law requires that bilge drain plugs on boats be open or removed when the boat is being transported, so as to let all water drain from the boat before the boat is launched in other waters.<sup>6</sup>

3. At approximately 4:30 p.m. on May 25, 2013, Officer Block observed a Ford F150 pickup truck with Oklahoma license plates hauling a trailer containing a 1987 Eliminator boat.<sup>7</sup> The pickup turned into the public access to Prior Lake off of Crest Avenue and drove past Officer Block's unmarked, black sport utility vehicle (SUV).<sup>8</sup>

4. When the pickup drove past, Officer Block observed that the bilge plug on the back of the watercraft was not removed.<sup>9</sup>

5. Officer Block approached the pickup and spoke with Appellant Vaughn Lemke, who was a passenger in the pickup truck.<sup>10</sup> Lemke identified himself as the owner of the boat.<sup>11</sup> Officer Block then ran a computerized check on the registration numbers of the watercraft and learned it was registered to Lemke.<sup>12</sup>

6. Officer Block advised Lemke that it was unlawful to transport a boat if the bilge plug is not open or removed.<sup>13</sup> Lemke explained that he lived close to the public access and that he had had the boat stored at his home for the last six years.<sup>14</sup> Lemke

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<sup>1</sup> Testimony of Adam Block.

<sup>2</sup> *Id.*

<sup>3</sup> "Invasive species" are defined as "[N]onnative species that: (1) causes or may cause economic or environmental harm or harm to human health; or (2) threatens or may threaten natural resources or the use of natural resources in the state." Minn. Stat. § 84D.01, subd. 9a (2012).

<sup>4</sup> Test. of A. Block. See also, [http://www.dnr.state.mn.us/invasives/index\\_aquatic.html](http://www.dnr.state.mn.us/invasives/index_aquatic.html)

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* See also, Minn. Stat. § 84D.10, subd. 4(b) (2012).

<sup>7</sup> Test. of A. Block.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* Testimony of Vaughn Lemke.

<sup>11</sup> Test. of A. Block.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*; Test. of V. Lemke.

stated that the boat had not been in the water for over six years due to mechanical issues.<sup>15</sup> In addition, Lemke explained that he had recently repaired the boat and given it to his stepson to use.<sup>16</sup> This was their first time attempt to put the boat in water in six years.<sup>17</sup>

7. Based upon his observations and verification that Lemke was the registered owner of the boat, Officer Block issued Lemke a Civil Citation, No. 172002, for failing to open or remove a drain plug while transporting water-related equipment. The penalty imposed was \$100.<sup>18</sup>

8. Lemke timely appealed the citation and requested that it be withdrawn.<sup>19</sup>

Based on the Findings of Fact, the Administrative Law Judge makes the following:

### **CONCLUSIONS OF LAW**

1. This matter is properly before the Administrative Law Judge and the Commissioner of Natural Resources pursuant to Minn. Stat. §§ 14.50, 84D.13, subd. 8, and 116.072, subd. 6.

2. Minnesota Statutes section 84D.10, subdivision 4(b) requires that drain plugs, bailers, valves, or other devices used to control the draining of water from ballast tanks, bilges, and live wells must be removed or opened while transporting water-related equipment. "Water-related equipment" includes boats.<sup>20</sup>

3. DNR Conservation Officers are authorized to issue citations to persons who violate Minn. Stat. § 84D.10, subd. 4(b).<sup>21</sup>

4. Pursuant to Minn. Stat. § 84D.13, subd. 8, an appeal of a civil citation shall be brought under the procedures set forth in Minn. Stat. § 116.072, subd. 6, provided that a hearing is requested within 15 days after receipt of the citation.

5. Lemke filed a timely appeal and request for hearing.

6. At a hearing on a violation of Minn. Stat. ch. 84D, the burden is on the DNR to show by a preponderance of the evidence that the appellant violated the statute cited.<sup>22</sup>

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<sup>15</sup> *Id.*

<sup>16</sup> Test. of V. Lemke.

<sup>17</sup> *Id.*

<sup>18</sup> Civil Citation No. 201381, on file and of record in this matter. See *also*, Minn. Stat. § 84D.13, subd. 5(a)(5).

<sup>19</sup> See Letter from Lemke to Commissioner of Natural Resources, dated May 28, 2013, on file and of record in this matter.

<sup>20</sup> Minn. Stat. § 84D.02, subd. 18a (2012).

<sup>21</sup> Minn. Stat. § 84.13 (2012).

<sup>22</sup> Minn. R. 1400.7300, subp. 5 (2012).

7. The DNR has established, by a preponderance of the evidence, that Stuckey violated Minn. Stat. § 84D.10, subd. 4(b), by transporting a boat without opening or removing its drain plug.

8. The Administrative Law Judge, therefore, finds that it is appropriate that the Commissioner affirm Invasive Species Civil Citation No. 172002.

9. The statutorily-prescribed fine for a violation of Minn. Stat. § 84D.10, subd. 4(b) is \$100.<sup>23</sup>

10. Pursuant to Minn. Stat. § 116.072, subd. 6(c), the Administrative Law Judge may not recommend a change in the amount of the proposed penalty unless the judge determines that, based upon the factors in subdivision 2,<sup>24</sup> the amount of the penalty is unreasonable.

11. The Administrative Law Judge finds that the penalty amount of \$100 is not unreasonable.

12. The attached Memorandum provides further explanation of the reasons for these Conclusions and is incorporated herein.

Based on the Conclusions of Law, and for the reasons set forth in the Memorandum below, the Administrative Law Judge makes the following:

### **RECOMMENDATION**

The Administrative Law Judge recommends that Invasive Species/Infested Waters Civil Citation No. 172002 issued to Vaughn Lemke be **AFFIRMED**.

Dated: August 7, 2013

s/Ann C. O'Reilly  
ANN C. O'REILLY  
Administrative Law Judge

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<sup>23</sup> Minn. Stat. § 84D.13, subd. 5(a)(6) (2012).

<sup>24</sup> Minnesota Statutes section 116.072, subdivision 2 (2012), provides that, in determining the amount of penalty, the commissioner may consider: (1) the willfulness of the violation; (2) the gravity of the violation, including damage to humans, animals, air, water, land, or other natural resources of the state; (3) the history of past violations; (4) the number of violations; (5) the economic benefit gained by the person by allowing or committing the violation; and (6) other factors as justice may require, if the commissioner specifically identifies the additional factors in the commissioner's order.

## NOTICE

Pursuant to Minn. Stat. § 116.072, subd. 6(e), the Commissioner may not issue a final order until at least five (5) days after receipt of the Report of the Administrative Law Judge. The persons to whom the order is issued may, within those five days, comment to the Commissioner, and the Commissioner will consider the comments. The final order of the Commissioner may be appealed, pursuant to Minn. Stat. §§ 14.63 and 14.69.

## MEMORANDUM

In support of his appeal, Lemke makes the following arguments:

- (1) That he was not the driver of the pickup truck that was transporting the boat;
- (2) He was not the true owner of the boat;
- (3) The boat had not been on any body of water, other than Prior Lake, since 1989;
- (4) The boat had not been in the water since 2006;
- (5) When the motor was replaced in May 2013, the bilge was degreased and there was no water in the bilge;
- (6) The boat was only trailered approximately 400 yards from his house to the public access;
- (7) The boat was transported twice each year – once to put it in Prior Lake and once to remove it from Prior Lake, and, therefore, it could not spread invasive species.<sup>25</sup>

### Ownership of Pickup Truck and Boat

The record establishes that Lemke was not the owner of the pickup truck transporting the boat to the launch.<sup>26</sup> Instead, the pickup was owned and operated by Lemke's stepson.<sup>27</sup> Although Lemke was not driving the pickup truck that was trailering the boat, he was present and assisting in the transportation of the boat – a boat that was legally registered to him as the owner.

Lemke asserts that he had given the boat to his stepson in April 2013, but had failed to transfer title to the boat.<sup>28</sup> According to Minn. Stat. § 86B.401, subd. 8(a):

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<sup>25</sup> See Lemke letter dated May 28, 2013.

<sup>26</sup> Test. of V. Lemke.

<sup>27</sup> *Id.*

<sup>28</sup> Test. of A. Block; Test. of V. Lemke.

An owner of a watercraft must provide written notice to the commissioner on a form prescribed by the commissioner by 15 days after abandonment, destruction, or a change in ownership of a licensed watercraft.

By failing to transfer title, and by failing to notify the DNR of the change in ownership, Lemke remained the registered owner of the boat at the time of the citation and was, thus, the legal owner of the boat for purposes of the citation.

It is undisputed that the boat was being transported while its bilge plug was still inserted. As the owner of the boat that was being transported with its bilge plug intact, and by participating in that transportation process, Lemke is the proper party responsible for the violation of Minn. Stat. § 84D.10, subd. 4(b).

### **Potential for Transmission of Aquatic Invasive Species**

Lemke also asserts that he should not be held responsible for a violation of Minn. Stat. § 84D.10, subd. 4(b) because it was not possible for the boat to be transmitting aquatic invasive species into Prior Lake.<sup>29</sup> According to Lemke, the boat had not been in any other lake, other than Prior Lake, since 1989; the boat had not been in water since 2006; and all of the water in its bilge had been drained during repair.<sup>30</sup>

Assuming all of these facts as true, it is unlikely that Lemke would be transmitting invasive species by transporting the boat from his nearby home into Prior Lake. However, the statute does not differentiate between boats that are high risk for transmitting invasive species and those that are low risk. Nor does it matter that the boat was only transported a short distance.

The purpose of the statute is to prevent all boats from being transported with their bilge plugs intact so that those boats that are transporting infested waters can be drained before entering another body of water. In order to prevent the spread of such harmful species, it is necessary that the law apply uniformly and consistently to all water-related equipment. There is simply no exemption in the law for boats that do not contain invasive species. After all, it takes only one boat to infest an entire lake. Thus, although Lemke provides mitigating factors as to why his violation of law did not present a risk to Prior Lake, he has not established any evidence to rebut the fact that he was, indeed, transporting a boat with its bilge plug intact.

In an appeal of a DNR citation, the burden of proof is on the conservation officer to prove by a preponderance of the evidence that a violation of law occurred.<sup>31</sup> A preponderance of the evidence means that it must be established by a greater weight of

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<sup>29</sup> Test. of V. Lemke.

<sup>30</sup> *Id.*

<sup>31</sup> Minn. R. 1400.7300, subp. 5.

the evidence.<sup>32</sup> “It must be of a greater or more convincing effect and ... lead you to believe that it is more likely that the claim...is true than...not true.”<sup>33</sup> The preponderance of the evidence standard is less than the clear and convincing standard, and less than the proof beyond a reasonable doubt standard used in criminal trials.<sup>34</sup>

Here, a preponderance of the evidence establishes that Lemke transported his boat to a Prior Lake public access while its bilge plug was inserted. Therefore, the DNR has met its burden of proving that Lemke was in violation of Minn. Stat. § 84D.10, subd. 4(b). In addition, the \$100 fine is reasonable.

The enforcement of laws to prevent the spread of aquatic invasive species is important to the state of Minnesota, its waters and natural resources, and to its people and economy. Patrolling public accesses to state waters is one of the best ways the DNR can prevent the spread of invasive species to uninfested waters. While a \$100 fine has a certain “sting” to an individual cited, it is reasonable in relation to the harm that the DNR seeks to prevent. According, it is respectfully recommended that the citation and fine be affirmed.

**A. C. O.**

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<sup>32</sup> 4 Minnesota Practice, CIV JIG 14.15 (2012).

<sup>33</sup> *State v. Wahlberg*, 296 N.W.2d 408, 418 (Minn. 1980).

<sup>34</sup> *State v. Shamp*, 422 N.W.2d 520, 525 (Minn. Ct. App. 1988), *citing Weber v. Anderson*, 269 N.W.2d 892, 895 (Minn. 1978), *review denied* (Minn. June 10, 1988).